Permata Chartered Merchant Bank Bhd v Hiew Fook Realty (Holdings) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO C23-2057-86
VC GEORGE J
14 OCTOBER 1991

Civil Procedure *— Appeal — Appeal from decision of registrar to judge-in-chambers — Appellant and his counsel and solicitors absent at hearing of appeal — Appeal struck out — Whether may be reinstated — Rules of the High Court 1980 O 28 r 1, O 32 rr 4, 5, O 55 & O 56*

Statutory Interpretation *— Implied provisions — Omission of necessary details from statute — Inclusion of provision in statute by implication — Whether necessary — Rules of the High Court 1980 O 32, O 55 & O 56*

The senior assistant registrar of the court had made an order against which the defendants appealed to the judge-in-chambers under O 56 of the Rules of the High Court 1980. When the appeal came up for hearing, the plaintiff respondent was represented by counsel but neither the defendants nor their counsel or solicitors were present. The appeal was therefore not heard and was struck off. The defendants applied for an order, inter alia, to have the appeal reinstated. Counsel for the plaintiff took a preliminary objection, saying that the court had no jurisdiction to reinstate an appeal that had been struck off once the order for striking off had been perfected as was the case here. He contended that the remedy for the absent defendants appellants was to appeal from the decision or order of the judge striking off the appeal.

Held, dismissing the preliminary objection:

(1) In respect of what should happen at the hearing of an appeal from the registrar to a judge there is a lacuna in the rules of procedure. The appeal procedures are not suitable — they are not available where the aggrieved person's complaint is that his application or appeal was struck off because he and his legal advisers were absent. Clearly what is needed is an application to restore the summons or appeal as the case may be supported by an affidavit of merits which explains the absence that resulted in the matter being struck off. A distinction has to be made between restoring a summons (or an appeal) and re-hearing a summons (or an appeal).

(2) The court has the jurisdiction to consider an application to restore an appeal that was struck off without it being heard on account of the appellant having been absent. The court should read into O 56 implied provisions necessary to deal with the situation. The detailed provisions in O 55 and O 32 of the Rules provide procedures that could and should be implied as being provisions to be read into O 56.

[Bahasa Malaysia summary

Penolong kanan pendaftar mahkamah telah memberi perintah dan defendan merayu terhadapnya kepada hakim dalam kamar menurut A 56 Kaedah-Kaedah Mahkamah Tinggi 1980. Di pembicaraan rayuan itu, plaintif/penentang diwakili oleh peguambela tetapi defendan, peguambela atau peguamacara mereka tidak hadir. Rayuan itu, oleh yang demikian, tidak didengar dan dibatalkan. Defendan memohon untuk perintah, antara lainnya, supaya rayuan itu dihidupkan semula. Peguambela plaintif telah membuat bantahan permulaan. Katanya mahkamah tidak ada bidang kuasa untuk menghidupkan semula satu rayuan yang telah dibatalkan apabila perintah pembatalan itu telah dilaksanakan (perfected) seperti yang telah dilakukan di dalam kes ini. Beliau berhujah bahawa remedi untuk defendan/perayu yang tidak hadir itu adalah membuat rayuan terhadap keputusan atau perintah hakim membatalkan rayuan itu.

Diputuskan, menolak bantahan permulaan itu:

(1) Berkenaan apa yang harus berlaku di pembicaraan sesuatu rayuan dari pendaftar kepada hakim, terdapat kekosongan dalam kaedah prosedur. Prosedur rayuan adalah tidak bersesuaian — tiada prosedur yang tersedia apabila aduan orang yang terkilan ialah bahawa permohonan atau rayuannya dibatalkan kerana beliau atau penasihat undang-undangnya tidak hadir. Jelasnya apa yang diperlukan ialah satu permohonan untuk menghidupkan semula saman atau rayuan itu, mengikut keadaan kes, disokong oleh satu afidavit atas merit yang menerangkan ketidakhadiran yang membawa kepada perkara itu dibatalkan. Satu perbezaan mesti dibuat di antara menghidupkan semula satu saman (atau rayuan) dan mendengar semula satu saman (atau rayuan).

(2) Mahkamah mempunyai bidang kuasa untuk mempertimbangkan permohonan untuk menghidupkan semula satu rayuan yang telah dibatalkan tanpa didengar oleh kerana perayu tidak hadir. Mahkamah harus membaca ke dalam A 56 peruntukan tersirat yang diperlukan untuk menghadapi keadaan ini. Peruntukan penuh dalam A 55 dan A 32 Kaedah-Kaedah itu membentangkan prosedur yang boleh dan harus diambil secara tersirat sebagai peruntukan yang wajib dibaca ke dalam A 56.]

Cases referred to

1 *Hession v Jones* [1914] 2 KB 421 (refd)
2 *Vint v Hudspith* (1885) 29 ChD 322 (refd)
3 *Brooksbank v JL Rawsthorne & Co* [1951] 2 All ER 413 (refd)
4 *SS Hontestroom v SS Sogaporack* [1927] AC 37 (refd)
5 *Donald Campbell & Co v Pollak* [1927] AC 732 (refd)
6 *West India Improvement Co v A-G of Jamaica & Anor* [1894] AC 243 (refd)
7 *Hartley v Hooker* [1777] 2 Cowp 523; 98 ER 1221 (refd)

Legislation referred to
Courts of Judicature Act 1964 s 17
Rules of the High Court 1980 O 28, O 32, O 55, O 56

Chang Wei Mun (*Mah-Kok & Din*) for the plaintiff.
Andrew KC Ng (*Yeo & Yeo*) for the defendants.

Cur Adv Vult

VC George J: The defendants had duly filed a notice of appeal against a decision of the senior assistant registrar. When the appeal came up for hearing on 8 April 1991 before me in chambers, the plaintiff respondent was represented by counsel but neither the appellants defendants nor their counsel or solicitors were present. There being nobody to prosecute the appeal it was not heard. It was struck off with costs.

By their application encl (18), the defendants seek to have the said appeal reinstated and for a date to be allotted for its disposal.

Encik WM Chang, counsel for the plaintiff, by way of preliminary objection opposed the application contending that the court had no jurisdiction to reinstate an appeal that had been struck off once the order of striking off had been perfected as was the case here.

Encik Chang first of all correctly pointed out that there is no express rule in the Rules of High Court 1980 allowing the reinstatement or the re-hearing of an appeal from the senior assistant registrar that had been struck off. There is only one rule in the Rules of High Court 1980 that specifically deals with appeals from the decisions of the registrar to a judge. It is O 56 r 1 which has four sub-rules to it. Rule 1(1) is the enabling provision. Rule 1(2) prescribes the procedure for trying such an appeal and sub-r (3) the time frame within which it has to be brought. The last sub-rule, (4), provides that such an appeal shall not operate as a stay of the proceedings unless the court otherwise directs. How the appeal is to be dealt with when it comes on for hearing is not dealt with by this order as is done, say, in O 55 which deals with appeals from subordinate courts to the judge. Inter alia, that order provides by r 5(1) that if the appellant is not present the court may dismiss the appeal. Rule 5(2) sets out what the court could do if the respondent is absent and r 5(3) expressly provides for the court to allow an application to have the appeal re-heard where it had been disposed of in the absence of one or the other of the parties.

Similarly, in respect of the hearing of a summons-in-chambers before a judge, the relevant rules in O 32 deal with various aspects of the proceedings at the hearing. Rule 4(1) provides that the hearing of a summons may be adjourned from time to time. Rule 4(2) provides that if a hearing is adjourned generally the party taking out the summons could have it restored to the list. Rule 5 deals with what the court could do if one or the other of the parties is absent — it could proceed to dispose of the matter. Rule 5(3) provides that if the order disposing of it has not been perfected the court may re-hear the summons. Rule 5(4) provides that when the summons has been dismissed without a hearing by reason of the failure of the party who took out the summons being absent, the court if satisfied that it is just to do so may allow the summons to be restored to the list.

It is to be noted that in respect of a r 5(4) situation, whether the order dismissing the summons has been perfected or not is not relevant. A distinction is made between the situation of the party taking out the summons being absent in which case the application cannot be heard because there would be nobody to move it and a r 5(3) situation where the summons is heard and disposed of on it being successfully moved by the applicant in the absence of the respondent.

In respect of originating summonses, which are dealt by O 28, it is expressly provided in r 1 thereof that O 32 r 5 shall apply in relation to originating summonses as it applies in relation to other summonses. It would seem then that in respect of what should happen at the hearing of an appeal from the registrar to a judge there is a hiatus, a lacuna, in the rules of procedure.

Encik Chang however contended that although O 56 does not have rules dealing with the disposing of appeals from the registrar to a judge it cannot be said that there is a lacuna because O 56 r 2 provides for an appeal to the Supreme Court from any judgment, order or decision of a judge. He contends that the remedy for the absent defendants appellants was to appeal from the decision or order of the judge striking off the appeal and there being such a remedy it cannot be said that there is a lacuna.

Hession v Jones[1] was relied on. But that was a case where the party that was absent was the respondent. The appellant was present and the appeal was heard and disposed of. *Hession v Jones*[1] makes a clear distinction between an application to reinstate a case which was struck out without it being heard and one which was disposed of after it was heard. *Vint v Hudspith*[2] and *Brooksbank v JL Rawsthorne & Co*[3] were also cited. They do not help. In both those cases the matter before the court was, in the absence of the party moving it, struck off, without it being heard. In both cases the court of first instance held that it had jurisdiction to reinstate the matter on application.

I fail to see how there could be an appeal to an appellate tribunal in respect of a matter which had not been heard and was struck off a matter which had not been heard and was struck off on account of the party that was to move the matter being absent. I asked Encik Chang to suggest how the appellate tribunal was to be appraised of the relevant facts to adjudicate on the issue which in the context has to be whether the proceedings before the judge of first instance was to be reinstated. The adjudication of the issue has to substantially turn on an explanation as to why the party was absent. Encik Chang suggested that an affidavit be filed explaining the position, to do which, in the context, there are no provisions in the rules pertaining to appeals which it could be said results in another lacuna! The appeal procedures are not suitable — they are not available where the aggrieved person's complaint is that his application or appeal was struck off because he and his legal advisers were absent. Clearly what is needed is an application to restore the summons or appeal as the case may be supported by an affidavit of merits which explains the absence that resulted in the matter being struck off. A distinction has to be made between restoring a summons (or an appeal) and re-hearing a summons (or an appeal).

Now, the Rules of the High Court 1980 having been made under powers given by a statute, namely, s 17 of the Courts of Judicature Act 1964, have

A themselves the force of statute in matters of procedure — see *SS Hontestroom v SS Sagaporack*[4] at p 47 per Lord Sumner and *Donald Campbell & Co v Pollak*[5] at p 804.

In the authoritative text book, *Maxwell On Interpretation of Statutes* (11th Ed) in the chapter entitled 'Intentions attributed to the legislature when it expresses none', the learned author relying on *West India Improvement Co v* B *A-G of Jamaica & Anor*[6] says at p 345:

> Although, as already stated, the legislature is presumed to intend no alteration in the law beyond the immediate and specific purposes of the Act, these are considered *as including all the incidents or consequences strictly resulting from the enactment.* (Emphasis supplied.) Thus, when the legislature imposes upon the C promoters of a railway or other undertaking an obligation to construct and maintain works, it necessarily follows that they must bear the cost of construction and maintenance, unless there be an express or plainly implied provision to the contrary.

At p 346 reliance is placed on a 1777 dicta of Lord Mansfield in *Hartley v* D *Hooker*[7] (at p 524) for illustrating the principle:

> Where an Act directs that a new offence which it creates shall be tried by an inferior court according to the course of the common law, the inferior court tries it as a common law court, *subject to all the incidents of common law proceedings*, and subject therefore to removal by writs of error, habeas corpus, and certiorari. (Emphasis supplied.)

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The principle is succinctly stated in Latin at p 350 of Maxwell:

> 'Cui jurisdicto data est, ea quoque concessa esse videntur, sine quibus jurisdicto explicari non potuit', ie where an Act confers a jurisdiction, it *impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary* F *to its execution.* (Emphasis supplied.)

Craies on Statute Law (7th Ed) states at p 111 under the heading 'Implication where enabling statutes omit some detail':

> If a statute is passed for the purpose of enabling something to be done, but omits to mention in terms some detail which is of great importance (if not actually G essential) to the proper and effectual performance of the work which the statute has in contemplation, the courts are at liberty *to infer that the statute by implication empowers that detail to be carried out.* (Emphasis supplied.)

The preliminary objection fails. The court has the jurisdiction to consider an application to restore an appeal that was struck off without it being heard H on account of the appellant having been absent. The court should read into O 56 implied provisions necessary to deal with the situation. The detailed provisions in O 55 and in O 32 provide procedures that could and should be implied as being provisions to be read into O 56. In this context it is to be noted that Encik Chang himself in effect was relying on O 32 r 5(3) in submitting that once the order disposing of the matter had been perfected I the court may not re-hear it. (Consequential orders based on the above finding were made).

Objection dismissed.

Reported by PS Ranjan